

Supreme Court of the United States

OCTOBER TERM, 1948.

No.

THE REPUBLIC OF THE UNITED STATES OF BRAZIL, trading
under the name and style of LLOYD BRASILEIRO,
Petitioner,

—against—

GENERAL FOODS CORPORATION,
Respondent.

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

The petitioner presents two questions for the consideration of this Court (Pet., p. 4):

“1. Did the cargo owner acquiesce in carriage of the balance of the cargo by the second ship?”

Under this heading the petitioner advances the argument that respondent waived right of recovery based on the false assertion in petitioner's bill of lading that the whole shipment of 10,000 bags of nuts had been laden on the “Felipe Camarao”, when, in fact, 5674 bags had not been so stowed. Both the District Court (R. 217, 220) and the Court of Appeals (R. 234, 235, 236) determined this issue of fact adversely to petitioner, and held that the evidence does not support the claim of waiver but, indeed, negatives it.

The second question which the petitioner presents to this Court is couched in these words (Pet., p. 4):

“* * * should a carrier which has fundamentally breached its bill of lading contract be held liable for a cargo loss, the proximate cause of which was not a fault of the carrier.”

This question was not raised in either the District Court or the Court of Appeals. As the latter court commented (R. 233), the only defense which the present petitioner advanced was that the present respondent had waived petitioner's breach of its contract. That court also pointed out (R. 233) that the present petitioner conceded that the case was controlled by *Olivier Straw Goods Corp. v. Osaka Shosen Kaisha (The Alaska Maru)*, 27 F. (2d) 129 (C. C. A. 2), cert. denied 278 U. S. 618, 47 F. (2d) 878 (C. C. A. 2), cert. denied 283 U. S. 856, unless breach of the contract had been effectively waived. That court commented that at the start of the trial in the District Court the present petitioner explained to the court:

“the sole issue in this case is whether the General Foods waived the short shipment by the ‘Felipe Camarao’ by agreeing to accept the balance of its shipment on another steamer.”

So far as we are aware, there is no decision in any Federal court in conflict with the principle of *The Alaska Maru* (*supra*). Both courts below pointed out that the decisions in *The Tregenna*, 121 F. (2d) 940 (C. C. A. 2); and by the House of Lords in *Tate & Lyle, Ltd. v. Hain S. S. Co., Ltd. (The Tregenna)*, 55 L. L. L. R. 159, on which petitioner relies (Pet., p. 5), are not in conflict with *The Alaska Maru* and are not in point in the present case.

The bill of lading was purchased by the present respondent in reliance on the bill of lading acknowledgment that the whole shipment was on board the “Felipe Camarao”.

Neither the respondent nor the petitioner's U. S. General Manager knew that the full shipment was not on the "Felipe Camarao" until that vessel arrived at Pensacola and finished her discharge. At that time the petitioner had already stowed the missing 5674 bags of nuts on the S. S. "Osorio" (R. 49, 112, 113, 218, 219).

Petitioner's assertions that respondent filed the bill of lading with its underwriters as a contract of carriage (Pet., pp. 3 and 19), and that the underwriter paid respondent's claim "as a war loss" (Pet., p. 3), are without support in fact or evidence.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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JOHN W. R. ZISGEN,
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General Foods Corporation.*